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In the Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, ET AL.,
PETITIONERS

v.

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

DAVID POPOWSKI
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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QUESTION PRESENTED

Whether the court of appeals erred in ordering petitioners to revoke certain rate increases for recyclable commodities until the Interstate Commerce Commission completes a remand proceeding to reconsider and redetermine the maximum reasonable rate level for recyclables.

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OPINIONS BELOW

The supplemental order of the court of appeals on petitions for rehearing (Pet. App. 1b-3b), which was entered on August 15, 1980, is not yet reported. The original opinion of the court of appeals (Pet. App. 1c-28c) is reported at 627 F. 2d 1328. The decisions of the Interstate Commerce Commission are reported at 361 I.C.C. 238 (Pet. App. 1d-61d); 361 I.C.C. 641; and 361 I.C.C. 856.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1980, and petitions for rehearing were denied on August 15, 1980 (Pet. App. 1b-3b). The petition for a writ of certiorari was filed on October 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *Background*

In Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 40, (4-R Act),[1] Congress directed the Interstate Commerce Commission to investigate the rail rate structure for transportation of recyclables and competing virgin materials. Congress further directed the Commission to "determine, after a public hearing during which the burden of proof shall be upon such common carriers by railroad * * *, whether [the] rate structure [for recyclables] is, in whole or in part, unjustly discriminatory or unreasonable." Section 204(a)(2) of the 4-R Act, 90 Stat. 40. Finally, Congress directed the Commission to issue, within twelve months of the date of enactment, "in all cases in which such transportation rate structure is determined to be, in whole or in part, unjustly discriminatory or unreasonable, orders requiring the removal from such rate structure of such unreasonable-

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[1]Section 204 is codified in part at 49 U.S.C. (Supp. III) 10731. Because relevant portions of the statute have not been codified, we refer here to the original sections as they appear in the statutes at large.

ness or unjust discrimination." Section 204(a)(3) of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 40.[2]

Pursuant to this mandate, the Commission conducted an investigation, which was designated *Ex Parte No. 319, Investigation of Freight Rates For The Transportation of Recyclable or Recycled Materials* (Pet. App. 1d). In a February 1977 order, the Commission found, based primarily on its conclusions that most recyclables did not compete with virgin materials, that the rate structure did not discriminate against recyclables. However, the Commission found that the rates for a small number of recyclable products were unreasonably high (Pet. App. 7c-8c). The court of appeals subsequently reversed that order, holding both that the Commission had applied an overly narrow definition of competition that was inconsistent with the statutory mandate and that the Commission had also improperly relieved the railroads of their statutory burden of proof. *National Ass'n of Recycling Industries* v. *ICC*, 585 F. 2d 522, 540 (D.C. Cir. 1978). The court of appeals remanded for a new investigation and corrective action within six months (*id.* at 541-543). This Court denied the railroads' petition for a writ of certiorari (440 U.S. 929 (1979)).

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[2]The legislative history of Section 204 reflects Congress' concern with the growing scarcity of virgin resources and the possibility that rail freight rates might be inhibiting increased movement of recyclables. Congress also expressed the view that the Commission had failed to give adequate consideration in its rate cases to the full competitive relationship between recyclables and virgin materials. S. Rep. No. 94-499, 94th Cong., 1st Sess. 51 (1975). The history of the Commission's summary consideration of the recyclable rate structure, which prompted enactment of Section 204, has been summarized by the court of appeals. See *National Ass'n of Recycling Industries Inc.* v. *ICC*, 585 F. 2d 522, 525-528 (D.C. Cir. 1978), cert. denied, 440 U.S. 929 (1979). As the court of appeals correctly noted, Section 204 is "an integral part" of Congress' continuing effort "to conserve resources and to promote recycling of depletable materials" (585 F. 2d at 531 n. 45).

B. *The Commission's Decision on Remand*

On remand, the Commission reopened its investigation and updated the record to reflect cost and rate increases since its initial investigation. On April 16, 1979, the Commission issued a decision in which it found competition between recyclables and virgin commodities in almost all categories (Pet. App. 1d-61d). In considering whether the rate structure discriminated against recyclables, the Commission first grouped the rates into three territories: East, South, and West. For each commodity, the Commission then determined the "revenue-to-variable cost ratio," that is, the ratio of the revenue produced by the rate fixed for the commodity (on a territorial average) to the variable cost of transporting that commodity. Unlawful discrimination would thus be found in those cases where the revenue/-variable cost ratio for a recyclable in a particular region exceeded that for the competing virgin commodity. The Commission applied this test and found discrimination with respect to some recyclable products, but not with respect to others. In those cases in which discrimination was found, the Commission ordered that the discrimination be eliminated within 90 days (Pet. App. 42d).

The Commission also determined, for purposes of the remand, that recyclable rates would be considered to be unreasonably high if they produced a revenue/variable cost ratio exceeding 180%. The Commission therefore ordered the elimination of all recyclable rates exceeding that maximum (see, *e.g.*, Pet. App. 21d, 38d). The Commission further ordered that the railroads, in eliminating any disparities between recyclable and virgin revenue/variable cost ratios, should not equalize the ratios at any level above 180%—the maximum reasonable level for recyclables (Pet. App. 7d-12d). In a subsequent order, entered in July 1979, the Commission made clear that the railroads were free to eliminate discrimination by raising rates for both recyclables and competing virgin commodities only so long as the resulting rates produced equal rates below 180%. At the same time, the Commission urged the railroads not to increase rates for recyclables (361 I.C.C. at 649-650).

Thereafter, the railroads filed tariffs resulting in various combinations of increases and reductions in recyclable and virgin commodity rates. The railroads also continued, after the Commission's decision, to file tariffs in general increase proceedings, incorporating increases that were applicable to both recyclables and virgin commodities.[3] In these general increase proceedings, the Commission permitted the railroads to increase recyclables rates only if the recyclable ratios did not exceed both the competing virgin commodity ratios and 180%.[4]

C. *The Court of Appeals Decision*

The railroads, as well as shippers of recyclables and virgin commodities, all sought judicial review of the Commission's decision. On April 25, 1980, the court of appeals upheld the Commission's findings that certain recyclable rates were discriminatory (Pet. App. 1c-28c). However, the court held that the remedy ordered by the Commission was unlawful because it did not prevent the carriers from equalizing the recyclable and virgin rates at a level above the recyclable rate in existence at the time of the Commission's order. The court thus vacated the Commission's decision as to remedies for unjust discrimination and required that "remedies result in equalization of ratios at a level not higher than the original ratios for recyclables which was found to be discriminatory" (Pet. App. 23c). The court also held that "[w]here railroads have already 'remedied' discrimination by increasing recyclable rates, * * * these increases must be revoked as inconsistent with the extent of the Commission's authority to remedy discrimination under section 204" (Pet. App. 23c-24c).

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[3]In addition to uniform increases, general increases include "special" increases, in which a particular recyclable or virgin commodity may be increased more or less than the average increase. See page 5, note 5, *infra*.

[4]See, *e.g.*, *Ex Parte No. 368, Increased Freight Rates and Charges Nationwide—1979* (Oct. 5, 1979) (unprinted), where the the Commission approved the lawfulness of a proposed general increase as applied

With respect to the reasonableness issue, the court held that the Commission's selection of 180% as the maximum reasonable ratio had not been adequately explained and was therefore arbitrary (Pet. App. 25c-27c). Thus, the court vacated the 180% standard and remanded for further proceedings to decide what rates for recyclables are unreasonable. The court also ordered that "[a]ny increase in ratios for recyclables toward the 180[%] level, made by railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable" (Pet. App. 27c). The court exempted general rate increases from the required revocation (*ibid.*).[5]

Various shippers petitioned for rehearing. National Association of Recycling Industries (NARI) contended that the court's decision was unclear because the exemption from revocation accorded general increases would leave standing "special" increases for recyclables, that is, increases that had been obtained by the railroads in certain general increase proceedings, that were above the general increase level. NARI requested that the court: (1) direct the Commission to revoke immediately all "special" rate increases imposed on recyclables during the past year; and (2) direct that the Commission not approve certain pending

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to recyclable commodities, provided that the standards developed in *Ex Parte 319* were met. The Commission's decision is described in *Union Electric Company* v. *United States*, 626 F. 2d 1348 (8th Cir. 1980). The railroads also filed numerous subsequent tariffs providing for individual increases in recyclable rates. Some of these rate increases were not challenged before either the Commission or the courts.

[5]"General rate increases" are rate increases usually made by a large number of carriers on all or almost all of their rates by the same percentage for the purpose of meeting systemwide revenue needs. General rate increases have been designed primarily to cover general cost increases, although in some cases some portion of general increases has not been cost-based. Moreover, in some cases, general rate increases impose higher percentage increases on some commodities than on others. See generally *Aberdeen & Rockfish R. R.* v. *SCRAP*, 422 U.S. 289, 311-316 (1975). See page 4, note 3, *supra*.

or future "new *special selective* rate increases on recyclables" until the Commission had determined anew the point separating reasonable and unreasonable rates. The railroads replied that all recyclable rate increases were within the Commission's guidelines, that those increases had never been adjudged unlawful, and that the court lacked jurisdiction to grant the relief requested.

The court of appeals denied the petitions for rehearing on August 15, 1980, but entered an order clarifying its original opinion. The court stated (Pet. App. 2b-3b):

> It was the Court's intent that the first order of priority be the reconsideration of the definition of reasonableness. Until that standard is set, the Commission obviously cannot review rate changes to determine which are unreasonably large. Similarly, until the standard is set, the railroad rate increases which may be discriminatory or unreasonable may not stand. The Court intended that the Opinion filed in this Court would prohibit any such increases in recyclable rates from those in force in April 1979—until the Commission has formulated an appropriate measurement of reasonableness. By leaving room for general rate increases—that is, those applied uniformly to all commodities—the Court did not mean to allow the Commission to circumvent or delay implementation of our opinion by permitting all sorts of rate increases to which only recyclables are subject.
>
> The Court again directs the Interstate Commerce Commission to proceed in an orderly fashion with determining a standard of reasonableness of recyclable shipping rates. Pending completion of that effort, those rate increases which have not been applied to virgin materials as well as recyclables are revoked.

The railroads subsequently petitioned the court of appeals and the Chief Justice to stay the court's order of August 15, 1980. Both requests were denied (Pet. App. 1f-2f; National of the Chief Justice, Sept. 25, 1980).

D. *Congressional Action Since the Decision and Order Below*

In the Staggers Rail Act of 1980, which President Carter signed into law on October 14, 1980, Congress established a maximum reasonable rate ceiling for recyclables other than scrap iron and steel. Section 204 of the Act (Pet. App. 7e) provides that the railroads must, within 90 days of the effective date of the Act, take all actions necessary to reduce or maintain rates on recyclables (except scrap iron and steel) at "revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses * * * plus a reasonable and economic profit or return."[6] The legislative history of the Act demonstrates that the average ratio standard is to be established by the Commission.[7]

DISCUSSION

In light of the passage of the Staggers Rail Act of 1980, the issues presented in this case may lack sufficient continuing importance to warrant plenary review. However, because the decision of the court of appeals is clearly erroneous and is inconsistent with prior decisions of this Court, the Court may wish to consider summary reversal.

1. At the outset, we note that the Commission was required by statute to analyze recyclable rates on two

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[6]The legislative history of the Act indicates that Congress estimated the level of the average ratio to be in the range of 140%-160%. S. Rep. No. 96-470, 96th Cong., 1st Sess. 34 (1980).

[7]123 Cong. Rec. H9919 (daily ed. Sept. 29, 1980); S. Rep. No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62 (1980). In an order served on November 18, 1980, the Commission instituted a proceeding under Section 204 in which it proposed a methodology for determining the

separate bases. First, the Commission was required to determine whether the rates were discriminatory. In other words, the Commission was required at the time of its April 1979 decision to determine whether the revenue/variable cost ratios for recyclables exceeded the revenue/variable cost ratios for competing virgin materials. Second, the Commission was required to make a separate and distinct determination as to the reasonableness of the recyclable rates. To make its reasonableness determinations, the Commission decided that unreasonable rates would be evidenced by a revenue/variable cost ratio exceeding 180% in April 1979.

The April 1980 decision of the court of appeals directly ordered the railroads to "revoke" all increases in all recyclable rates that the railroads had instituted after April 1979, excepting only those increases made as part of general rate increases. This revocation order rested on two premises. First, with respect to the Commission's discrimination findings and remedy, the court concluded that Section 204 of the 4-R Act did not permit the remedying of discrimination through the raising of discriminated against recyclable rates, even if the virgin and recyclable ratios were equalized through the concurrent raising of rates for competing virgin materials. Thus, the court held that discrimination could be remedied only by equalizing ratios at a level equal to or below the level of the discriminatory recyclable rates existing in April 1979, and that all "remedial" increases that had been applied to discriminatory recyclable rates since that time must be revoked (Pet. App. 23c-24c).[8]

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average ratio standard, indicated that its calculations under the methodology resulted in an average ratio of 150%, and invited public comments on the proposal. 45 Fed. Reg. 76551 (1980).

[8]Although this aspect of the court's April 25, 1980, decision is plainly erroneous, the consequences of that error appear to have been nullified by the court's "clarification" order of August 15, 1980. The holding is

Second, because the court set aside the Commission's determination of maximum reasonableness as not having been adequately justified, the court concluded that "[a]ny increase in ratios for recyclables toward the 180 percent level, made by railroads as a result of and in relation to the Commission's decision of 16 April 1979, must be revoked until such time as the ICC issues a new determination of what rates are reasonable" (Pet. App. 27c). However, the court excepted increases taken in general rate proceedings because general rate increases are primarily designed to recover cost increases, and to that extent do not change the revenue/variable cost ratio (Pet. App. 27c).

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erroneous because it ignores the fact that discriminatory and unreasonably high recyclable rates present two separate issues. If the disparity between the revenue/variable cost ratios of recyclable and competing virgin material rates is eliminated, the discrimination is thereby eliminated. The level at which the ratios are equalized is therefore immaterial for discrimination purposes.

The remedy mandated by the court of appeals' decision would also require a pointless exercise. As soon as the railroads implemented that remedy, they would be free thereafter to raise both recyclable and competing virgin rates to any equalized level below the maximum reasonable level. If, for instance, the April 1979 ratio for recyclable R were 130%, the level for the competing virgin material V were 120%, and the maximum reasonable level for R were 160%, the carrier could, under the Commission's decision, remedy the discrimination by equalizing the ratios at any level below 160%. Under the court's view, the carrier could do so only by equalizing the ratios at a level at or below 130%. However, unless the court intended recyclable rates to be frozen forever at the levels that happened to exist in April 1979 (which, in some cases, may have been far below the maximum reasonable level), the carrier would be free the next day to raise both rates toward 160%.

In its April 1980 decision, the court ordered the immediate revocation of all "remedial" increases in previously discriminatory recyclable rates and required this revocation to occur before the Commision completed its reconsideration on remand of the maximum reasonable rates. In its August 1980 clarification order, however, the court appears to have (1) reversed the original priorities by first requiring the Commission to determine the maximum reasonable level, and (2) ordered revocation of *all* rate increases since April 1979 in *all* recyclable rates to the extent they have exceeded increases in competing virgin materials. See page 6, *infra*.

In its August 15, 1980, "clarification" order, the court ordered that the Commission first determine the maximum reasonable level, and it also ordered that "those rate increases which have not been applied to virgin materials as well as recyclables are revoked" (Pet. App. 2b-3b). This order appears to be premised on the court's earlier conclusion that non-cost-based rate increases cannot be implemented pending the Commission's determination of the maximum reasonable level. But the effects of the court's clarified revocation order are uncertain. Although it may have been based on the court's concern with discrimination, the revocation order bears little relation to that concern because it requires revocation of all unmatched increases in all recyclable rates, including those relating to recyclable rates that had never been found to have been discriminated against, some of which had revenue/variable cost ratios that were far below the ratios for the competing virgin materials.[9]

2. The court of appeals' clarified revocation order is erroneous for several reasons.

a. To the extent that the court's order is based on the premise that carriers may not increase rates pending the Commission's consideration of the maximum reasonable rate level, the order is contrary to well established authority. The legal principles most relevant here were carefully explained in *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 817-826 (1973), in which this Court noted that the courts may not enjoin a particular rate increase prior to a final determination *by the Commission* as to the lawfulness of the increase filed by the railroads (412

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[9]Compare, *e.g.*, scrap iron and steel (the largest group of transported recyclables) and iron ore in the East—148% and 232% respectively (Pet. App. 13d); rubber and plastic scrap and virgin rubber commodities in the East—119% and 231% respectively (Pet. App. 32d).

U.S. at 820, citing *Arrow Transportation Co.* v. *Southern R.R.*, 372 U.S. 658 (1963)). See also *Southern Ry. Co.* v. *Seaboard Allied Milling Co.*, 442 U.S. 444 (1979). Even after the Commission has made a final determination as to the reasonableness of particular rates, and that determination has been judicially reviewed and set aside, the rate increase itself may be enjoined only in narrowly defined circumstances. Thus, the Court stated in *Wichita Bd. of Trade* (412 U.S. at 832; footnotes omitted):

> If a reviewing court cannot discern [the agency's] policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction [against the rate increase itself] pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. * * * When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.

Here, the remand ordered by the court of appeals with respect to the Commission's original maximum reasonable rate determination is precisely the type of remand that, under *Wichita Bd. of Trade*, should not be accompanied by an interim injunction against rate increases. The court below remanded this matter only because it believed that the Commission had not adequately explained its choice of the 180% level. Moreover, the court noted that the Commission might be able adequately to support that figure—or an even higher figure—on remand. See Pet. App. 24c-27c. Clearly, the court did not articulate a "substantial doubt" (412 U.S. at 822) that the particular figure chosen would be inconsistent with Congress' mandate.

Thus, to the extent that the court's clarified revocation order was based on its remand for further explanation of the Commission's maximum reasonableness finding, that order was erroneous.[10]

b. To the extent that the court of appeals' revocation order may have been premised on the view that the anti-discrimination remedy prescribed by the Commission was inappropriate, the order is also plainly erroneous. The revocation order applies to all rate increases on *all* recyclable rates, including those that were found not to be discriminated against on the ground that their revenue/variable cost ratios were below those of competing virgin commodities

3. Although we believe that the decision below is plainly in error and should be reversed, it is not clear that the effect of that decision will be sufficiently significant or continuing to warrant plenary review by this Court. The court of appeals has ordered the revocation of certain rate increases until the Commission redetermines the maximum reasonable level for recyclable rates. However, Section 204 of the Staggers Rail Act requires that, before the end of this year, the Commission shall establish a maximum level for all recyclables except scrap iron and steel, which level Congress intends to be within a revenue/variable cost ratio range of 140% to 160%. See page 7, note 6, *infra*. Furthermore, Section 212 of the Staggers Act has significantly amended the standards for finding discrimination against rates that had existed under prior law and that had been applied by the Commission and the court of appeals in these proceedings.

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[10]An injunction is patently inappropriate pending remand proceedings because the shipper will be entitled to reparations if the rates charged during the remand proceedings are ultimately found to have been unreasonably high. If the carriers are enjoined from charging rates that the Commission ultimately finds to be reasonable, however, the carriers have no ready means of recovering those lost revenues. See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, *supra*, 412 U.S. at 824.

The Commission is currently undertaking the task mandated by Congress; in addition, it intends in the near future to redetermine the maximum reasonable level for scrap iron and steel. When those levels are established, and the Commission issues appropriate implementing orders under the requirements of the Staggers Act, the court of appeals' present revocation order will be superseded and will no longer have any prospective effect.

CONCLUSION

The issues presented in this case may lack sufficient continuing importance to warrant plenary review in light of the passage of the Staggers Rail Act of 1980 and the impending completion of the remand proceedings before the Commission. However, because the court of appeals' decision is clearly erroneous and is inconsistent with decisions of this Court, the Court may wish to consider granting the petition for a writ of certiorari and summarily reversing the judgment below.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

DAVID POPOWSKI
Attorney
Interstate Commerce Commission

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